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Understanding *Mahon* in Historical Context

William Michael Treanor

Georgetown University Law Center, wtreanor@law.georgetown.edu

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WILLIAM MICHAEL TREANOR*

Holmes's judicial opinions are, far too frequently, better art than law. We remember his elegant phrases. We admire his brilliant rhetoric. We applaud his creativity and insight. But, when we try to determine the precise rule of law embodied in his decisions, we struggle, because Holmes's analyses are brief, cryptic, and incompletely developed.

Despite its enormous influence on constitutional law, *Pennsylvania Coal Co. v. Mahon*[1] is just such an opinion; the primary purpose of my article *Jam for Justice Holmes: Reassessing the Significance of Mahon*[2] is to clarify Holmes's intent by placing the opinion in historical context and in the context of Holmes's other opinions. While other scholars have also sought to place *Mahon* in context, my account differs in large part because of its recognition, as part of the background of *Mahon*, of a separate line of cases involving businesses affected with a public interest.

I argue that at the time Holmes wrote *Mahon*, cases involving businesses affected with a public interest were the only ones in which the constitutionality of regulations turned on the effect those regulations had on property values. Previous scholars have either overlooked these cases altogether or collapsed them in with other substantive due process cases without recognizing their analytic distinctiveness. The consistent treatment of *Mahon* as a conservative decision follows. *Mahon* is sometimes seen as a case that supplemented substantive due process by giving judges a new tool to invalidate statutes; under this view, as a result of *Mahon*, regulations could, for the first time, be overturned because they diminished value too greatly.[3] Alternately, *Mahon* is seen as a *Lochner*-type case, reaffirming the principle that regulations that diminish value were unconstitutional as previously recognized by that line of cases.[4]

Because they either fail to see that there were some cases before *Mahon* involving regulations in which the effect on value was deemed relevant to the regulation's constitutionality or fail to see that these cases all involved businesses affected with a public interest, these scholars have missed the aspect of *Mahon* that is critical to understanding it: In evaluating the constitutionality of the Kohler Act, Holmes was treating diminution in value as relevant, even

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* Associate Professor of Law, Fordham University School of Law. J.D., Yale, 1985; A.M. (History), Harvard, 1981; B.A., Yale, 1979. I thank Howard Shapiro for his suggestions. I also thank *The Georgetown Law Journal* for this opportunity to reply. Finally, I thank Richard Epstein and Robert Brauneis for their thoughtful responses to my primary article.

1. 260 U.S. 393 (1922).

2. William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813 (1998).

3. *See id.* at Part IIA.

4. *See id.* at Part IIB.

though the business involved was not one affected with a public interest. In so doing, Holmes was sharply breaking from the traditional categorical rules used by the Court. In place of those rules, he was employing a balancing test that was strongly weighted in favor of the government—a balancing test in which diminution in value was the factor on the property owner's side of the balance. The precise nature of that balancing test—and specifically the fact that it was weighted in favor of the government—is not obvious from reading *Mahon* alone. But when *Mahon* is placed in the context of the full range of Holmes's opinions concerning regulations or government actions that caused consequential damages, it becomes obvious that Holmes applied balancing tests and that the private property owner prevailed only when the government action was (from Holmes's perspective) arbitrary or when the government action was tantamount to an exercise of the eminent domain power. Despite the result in *Mahon*, the *overall* effect of this new test was to expand the realm of permissible government action.

Professors Richard Epstein and Robert Brauneis have offered substantial and interesting critiques of my article.[5] Their responses have different focuses. While Professor Epstein contends that I overstate the extent to which Holmes favored deference to legislatures, his fundamental quarrel is with Holmes, not with me. Professor Brauneis, in contrast, is concerned with defending his previously-advanced thesis of the meaning of *Mahon* and its relation to precedent.[6] Despite these differences, the responses can be usefully paired. In this reply, I draw on Professor Epstein's articulation of pre-*Mahon* constitutional property jurisprudence to show precisely what Holmes rejected and why. I then build on this discussion to show why I reject Professor Brauneis's reading of *Mahon*. I conclude by discussing the significance of my thesis.

I. REPLY TO PROFESSOR EPSTEIN

Professor Epstein takes me to task for having "lost sight of [the] basic structure"[7] of the Supreme Court constitutional property caselaw that formed the backdrop to *Mahon*. In my article, I sought to identify the basic legal principles present in pre-*Mahon* caselaw, and admittedly did not focus on developing the intellectual underpinnings of that caselaw. Professor Epstein undertakes to do what I did not, and his discussion is illuminating.

Epstein offers a libertarian justification of the caselaw. Libertarian theory, he posits, provides two[8] reasons for regulating private behavior. First, government

5. Robert Brauneis, *Treanor's* Mahon, 86 GEO. L.J. 907 (1998); Richard A. Epstein, Pennsylvania Coal v. Mahon: *The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875 (1998).

6. *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal v. Mahon, 106 YALE L.J. 613, 618 (1996).

7. Epstein, *supra* note 5, at page 877.

8. While Epstein acknowledges that there are more than two rationales, he concludes that only two bear on *Mahon*. *See id.* at 876 n.9.

may counter aggression.[9] Second, government may counter the risk of monopoly pricing.[10] According to Epstein, the first principle underlay the Court's traditional police powers doctrine, the second its caselaw involving businesses affected with a public interest.[11]

Epstein admirably explains much of the pre-*Mahon* caselaw, caselaw that might otherwise appear riddled with incomprehensible distinctions and attitudes. Epstein's account, however, does not encompass two types of cases from Holmes's day (other than Holmes's decisions). One of those types includes those cases in which the business affected with a public interest doctrine was deemed applicable, not because of concern about monopoly, but because of, to quote Epstein, "the size and importance of the industry, or of the firms within it."[12] Epstein acknowledges the existence of these cases and recognizes that his explanation fails to account for them.[13] The second type of case includes those police power cases in which the Court upheld regulations aimed at promoting morality. Classically, police power cases could be justified as serving one of three ends: safety, health, or morality. The first two ends can be justified on libertarian grounds. The third is, at the very least, hard to square with libertarianism, and Epstein noticeably does not discuss these cases.

Both Epstein's account and its explanatory limits help explain why Holmes rejected constitutional orthodoxy. The incomplete nature of Epstein's account suggests, at a fairly obvious level, the incoherence of the precedent: while some of the leading decisions could be defended on libertarian grounds, others could not. So, in cases in which other Justices suggested (á la Epstein) that the Due Process Clause meant that only legislation concerned with preventing harm could pass muster, and that harm had to be narrowly understood, Holmes could respond by citing examples drawn from the morality wing of the police power caselaw. *Lochner* most prominently exemplifies this point. Holmes wrote:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this [statute limiting the hours bakers could work], and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries.[14]

Implicitly, Holmes challenged orthodox jurisprudence by asking: Why is promoting morality a legitimate end, while promotion of some other end sanctioned by the majority is not?

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9. *Id.* at Part IB.
10. *Id.* at Part IC.
11. *Id.* at Part ID.
12. *Id.* at 885.
13. *Id.*
14. Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting).

Thus, Holmes easily dismissed the constitutional property jurisprudence reflected in the Court's decisions because of its inconsistencies and incoherencies. Suppose, instead, that Holmes confronted a constitutional property jurisprudence that embodied a coherent expression of libertarian philosophy—specifically, a jurisprudence of the type outlined by Epstein—would he have embraced it? Again, the answer is no, and for two reasons. The first reason flows from Holmes's constitutional theory, and, as before, the classic statement of the relevant aspect of this theory appears in his *Lochner* dissent: "The [Fourteenth] Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A c]onstitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[15] Holmes would have rejected Epstein's vision because Holmes did not understand the Constitution as implicitly incorporating libertarian theory. As the quote from the *Lochner* dissent indicates, Holmes saw no basis in the constitutional text or other legitimate source of constitutional authority for holding that government could regulate activity only in the interests of health or safety.

The second difference between Holmes and Epstein is analytic. In discussing *Mahon*, Epstein accepts my view of Holmes as a balancer.[16] He adds that "balancing is always required in every legal context."[17] This is not true, however. Legal analysis does not inevitably turn on balancing, as Epstein's own approach demonstrates. His proposed approach to takings law has two aspects: government can regulate to prevent aggression and to prevent an individual from reaping monopoly profits; if its regulation does not serve these ends, it must compensate individuals for any economic loss they suffer. Balancing enters neither aspect of this analysis. The same point is true of the pre-*Mahon* caselaw that falls outside Epstein's account. For example, with respect to the legislation justified as protecting morality, courts asked simply whether the legislation was truly aimed at promoting morality and whether the means employed were suited to that end. The inquiry did not involve balancing. As I seek to show in my article, all of the pre-*Mahon* caselaw employs such categorical rules.

Epstein has a faith that Holmes lacked in the ability of legal reasoning to lead to determinate answers, and Holmes's lack of faith led him to reject traditional categorical rules and to defer to legislative judgments. It led Holmes, in particular, to reject traditional substantive due process jurisprudence (and it would have led him to reject Epstein's modified version of that jurisprudence). In place of that jurisprudence, Holmes employed a balancing test in which a crucial factor was the effect of the regulation on value. Perhaps because his approach is so different from Holmes's, Epstein misreads *Mahon*. Contrary to Epstein, *Mahon* does not reflect an "erratic takings jurisprudence."[18] Where

15. *Id.*
16. Epstein, *supra* note 5, at 896.
17. *Id.*
18. *Id.* at 875.

Epstein finds the opinion repeatedly "shifts ground"[19] and "veers,"[20] Holmes's approach in the opinion largely reflects the balancer's recognition of the weight of the claims on both sides of the controversy. My claim is not that *Mahon* is a model of judicial craftsmanship. Written with characteristic Holmesian haste, it isn't. But, as I seek to show in my article, it reflects a consistent stance and an underlying theory.

Epstein's view of Holmes as erratic is not simply a product of Epstein's reading of *Mahon*. It is, at another level, a product of what Epstein sees as the tension between the result in *Mahon* and Holmes's *Lochner* dissent.[21] But, as my article seeks to show, focus on the result in *Mahon* obscures Holmes's underlying vision. The facts of the case bring it within an area where the Holmesian balancing approach leads to a result more favorable to the property-owner than a traditional approach (at least as applied by a progressive traditional judge such as Brandeis). It should be added that I note one other case which featured such a seemingly anomalous result, *Miller v. Horton*.[22] *Miller* was the Massachusetts Supreme Judicial Court case in which town officials ordered destruction of a horse to avoid the spread of glanders; the horse owner sought compensation when it was subsequently determined that the horse was healthy. Stretching the statute at issue in order to avoid constitutional problems, Holmes rules in the horse owner's favor.[23] Strikingly, as I read Epstein's response, he would have ruled in favor of the officials.[24] Obviously, as a general matter Epstein's approach is more favorable to the property owner than Holmes's. Thus, Epstein's discussion of *Miller* supports one of my points about *Mahon*: as he rejected the existing tests, Holmes fashioned a new rule that despite its overall thrust was, in a limited range of situations, better for property owners than the traditional approach.

In sum, Epstein's response helps highlight how and why Holmes departed from traditional substantive due process jurisprudence. Holmes rejected that jurisprudence because it was incoherent, because it was (in large part) libertarian, and because it employed a formalist analytic approach that rested on a view of legal reasoning which conflicted with his own.

II. REPLY TO PROFESSOR BRAUNEIS

In his 1996 article on *Mahon*, Professor Brauneis advanced the thesis that, while Holmes's opinion departed from substantive due process orthodoxy in

19. *Id.* at 895.

20. *Id.* at 901.

21. *See id.* at 888.

22. 152 Mass. 540 (1891). For my discussion of this case, see Treanor, *supra* note 2, at 842-43.

23. *See Miller*, 152 Mass. at 547-48. For further discussion, see Treanor, *supra* note 2, at 842-43.

24. *See* Epstein, *supra* note 5, at 880-82. Epstein's discussion of the case does not include any statement about how it should have been resolved, but the test he sets forth—regulations that fall within the police power are valid unless their is invidious motive or selective application—would seemingly lead to a ruling in favor of the officials.

certain limited ways, it was fundamentally consistent with that caselaw. For example, he wrote:

> Holmes and the 1922 Court . . . rather than viewing *Mahon* as a seminal case . . . understood the decision as one among many that incrementally established the limits of the police power. Although *Mahon* was part of a trend toward accepting that the constitutionality of nontrespassory regulations could turn on the provision of compensation, it was not the first case to so hold.[25]

In contrast, I, as the discussion in the previous section shows, view *Mahon* as a radical departure. A critical difference between my article and Professor Brauneis's is that I see Holmes's concern with value as innovative because effect on value had not been deemed a factor in traditional police power cases. Brauneis, on the other hand, did not treat the businesses-affected-with-a-public-interest cases as a distinct line and consequently he simply saw *Mahon* as one of a number of cases from the era to treat value as a factor relevant to constitutionality. In his article, *Mahon* is a substantive due process case "differently only in degree" from *Lochner*.[26]

In the introduction to his response, Brauneis downplays the differences between our articles. He notes that both his article and mine claim to offer a new understanding of *Mahon*, but adds that "neither articles delivers transfiguration."[27] "[S]tripped of the bright plumage spred to court publication," he writes, "the articles reveal that Treanor and I have substantial areas of agreement regarding Holmes's general approach to constitutional law, deference to legislatures, the textual basis of *Mahon* and *Mahon*'s reputation."[28] I strongly disagree with the suggestion that my claim is overstated. (Professor Brauneis is free to characterize his own contribution as he wishes.) *Mahon* is a very different case if it is understood, not as one of the cases that "incrementally established the limits of the police power"[29] during an era of extensive judicial oversight of economic legislation, but as a case that fundamentally rejected all of the elements of the period's conservative jurisprudence. *Mahon* is, for Brauneis, *Lochner*-lite. For me, it is of a piece with Holmes's *Lochner* dissent.

One of the principal differences between my article and Brauneis's concerns *Mahon*'s reputation in the years between 1935 and 1958. Brauneis writes that, after 1935, "*Mahon* appeared to be destined for oblivion . . . ."[30] I argue, in contrast, that the case was well-remembered during this period—in particular, because of the split between Holmes and Brandeis.[31] Nonetheless, "it was, at

25. Brauneis, *supra* note 6, at 666.
26. *Id.* at 676.
27. Brauneis, *supra* note 5, at 907.
28. *Id.*
29. Brauneis, *supra* note 6, at 666.
30. *Id.* at 680.
31. *See* Treanor, *supra* note 2, at 861-62 (immediate reaction to case); *id.* at 864 (pre-1958 prominence of the case).

first, an uninfluential case, in the sense of affecting Supreme Court decisions."[32] Brauneis's response fails to recognize my point here. He writes, "I will be happy to concede *Mahon*'s prominence, . . . if Treanor will concede that the prominence was completely unrelated to any sense that *Mahon* represented a doctrinal innovation."[33] Similarly, he concludes with a challenge: "If, as one last concession, Treanor will agree that, between 1935 and 1958, *Mahon* remained in memory almost entirely as a Holmes case, . . ., then I will be content and put down my pen."[34] No concession is necessary. It is precisely my claim that Holmes's contemporaries failed to see the doctrinal innovation underlying *Mahon* and Holmes's other constitutional property cases: "Given the novelty of [Holmes's] approach and the opaqueness of his presentation, it is easy to see why his contemporaries failed to see what he was doing and failed to follow him."[35]

In contrast, Brauneis and I do disagree about whether the Contract Clause was (alongside the Due Process Clause) one basis for the decision in *Mahon*. He believes it was; I believe it wasn't. It should be added that this is not a significant part of my argument; while Brauneis offers an extensive rebuttal of my position,[36] my discussion of the Contract Clause is limited to a footnote,[37] and my argument in the article in no way turns on whether the Contract Clause was an alternative basis to the decision in *Mahon*. The issue as to the role the Contract Clause plays in the decision turns simply on how one parses the text. Brauneis points out that the Pennsylvania Supreme Court decisions discuss the Contract Clause issue,[38] that the briefs in the case also discussed the issue,[39] and that Frankfurter in the appendix to his law review article on Holmes's constitutional opinions listed it as a Contract Clause case.[40] He's right. Nonetheless, examination of the one direct reference to the Contract Clause in the opinion and the other references to contract that Holmes makes shows that the Contract Clause is never actually the basis for the decision.[41]

By stressing the continuities between *Mahon* and the caselaw that preceded it, Brauneis's article reinforces a view of the case that I believe is fundamentally inaccurate. I also believe that that understanding of *Mahon* has had a deleterious effect on modern takings jurisprudence. I will return to these points, but want to address briefly some of the more specific points Brauneis raises.

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32. *Id.* at 862.
33. Brauneis, *supra* note 5, at 930.
34. *Id.* at 932.
35. Treanor, *supra* note 2, at 862.
36. Brauneis, *supra* note 5, at 924-26.
37. Treanor, *supra* note 2, at 828 n.88.
38. Brauneis, *supra* note 5, at 925 & n.103.
39. *Id.* at 925 & n.107.
40. *Id.* at 926 & n.108. For the article, see Felix Frankfurter, *Twenty Years of Mr. Justice Holmes's Constitutional Opinions*, 36 HARV. L. REV. 909, 937 (1923).
41. The relevant references are provided in Brauneis, *supra* note 5, at 925. I leave the proof to the reader.

Brauneis devotes much of his response to critiquing my claim that the two sets of circumstances in which Holmes believed government actions affecting property rights were unconstitutional were those in which government acted to benefit itself or in which no public interest was served by the government action. Part of his argument here is evidentiary. In particular, with respect to the first set of circumstances, Brauneis discounts my reading of Holmes's letter to Frankfurter about *Mahon*, a source he did not draw on in his article, and argues that the parallel passage in Holmes's letter to Pollack about the case better explains Holmes's theory.[42] Presumably, however, Holmes would more carefully explain his legal doctrine in writing to Frankfurter than to Pollack, his letters to the latter being notorious for their incomplete legal discussion. As Professor Walton Hamilton observed of the Holmes-Pollack letters, "[Holmes] affords only passing glances [into his opinions], hardly ever enough for his English friend to know what the cause [was] about."[43]

With respect to the second set of circumstances, Brauneis agrees that these were cases in which Holmes believed compensation was owed, but he argues that underlying Holmes's approach was not utilitarianism, but justice-based concerns.[44] Part of Brauneis's argument is simply that this is not an approach a utilitarian would favor. In fact, however, it can be squared with utilitarianism, although utilitarianism combined with the limited faith in judicial decisionmaking characteristic of Holmes.

One of the standard defenses of a compensation requirement is utilitarian. Such a requirement forces the state to determine whether the benefits of a taking outweigh the costs. In the absence of such a requirement, the state would have an incentive to take, because the property could be acquired for free. With a compensation requirement, however, the state will take only if the benefits it derives outweigh its costs.[45] Holmes's opinions reflect the view that, while legislative determinations generally should stand, deference stops at the point of simple transfers from one person to another or when the government uses the property to benefit itself. In other words, though a court normally should allow the legislature to weigh competing interests, there comes a point when even a deferential court will assume that the legislature erred in its utilitarian calculus, and beyond that point the court will mandate compensation.

The other part of my disagreement with Brauneis about why Holmes favored compensation in this set of circumstances grows out of the fact that he and I read Holmes differently. In his constitutional property decisions, Holmes repeatedly employed two rhetorical moves. He typically employed the language of

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42. *See id.* at 913-14. For the relevant part of my article, see Treanor, *supra* note 2, at 853, 859-60 & n.275.

43. Walton H. Hamilton, *On Dating Mr. Justice Holmes*, 9 U. CHI. L. REV. 1, 25 (1941).

44. *See* Brauneis, *supra* note 5, at 914-20.

45. Professor Epstein, for example, advances such a justification in his response. *See* Epstein, *supra* note 5, at 896-97.

balancing, as Brauneis acknowledges.[46] This is the language on which I focus. At the same time, Holmes typically also used the language on which Brauneis focuses when he claims that "Holmes was centrally concerned with assessing degrees of change from principles (or 'structural habits') embedded in positive law . . . ."[47] Thus, Holmes employed language that suggests that courts are involved in careful analysis of the precedent concerning what types of regulation are permissible and careful consideration of individual circumstance. For example, in *Mahon*, Holmes writes:

> [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. Block v. Hirsch, 256 U.S. 135. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170. Levy Leasing Co. v. Siegel, 258 U.S. 242.[48]

The real question is: Which of the two types of language actually reflects Holmes's approach and which is primarily rhetoric? Brauneis finds in Holmes's opinions attention to structural habits. I find in these opinions, however, a consistent lack of careful attention to the facts of the precedent and to the principles they might embody. As the quoted language from *Mahon* evidences, there is simply citation to precedent, cursory summary, and invocation of the principle that everything is a question of degree. Examination of the *results* in the Holmes body of decisions suggests that Holmes was guided by the government-weighted balancing test I outline, rather than the complicated calculus Brauneis develops. "Results," Brauneis writes at one point in his response, "are indispensable reality checks for verbal formulae . . . ."[49] I agree. The outcomes Holmes reaches reflect the rules I describe.

Finally, Brauneis acknowledges as significant my discussion of the businesses-affected-with-a-public-interest case law: "*Mahon*'s innovation may have been the principled expansion of just compensation analysis beyond the 'affected with a public interest' category."[50] While Brauneis does not develop why

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46. Brauneis, *supra* note 5, at 917 ("To be sure, we can find language in Holmes opinions suggestive of cost-benefit analysis.").

47. *Id.* at 909.

48. *Mahon*, 260 U.S. at 416.

49. Brauneis, *supra* note 5, at 921.

50. *Id.* at 928. Brauneis does not completely accept my thesis here, because he says that there are "isolated cases" outside the "affected with a public interest" category in which government acts were invalidated for lack of compensation. *See id.* at n.123 (citing Curtin v. Benson, 222 U.S. 78 (1911)

it is significant that *Mahon* was "innovative" in this fashion, I would like to do so here because consideration of this point shows why *Mahon* was not a case that "incrementally established the limits of the police power,"[51] but rather a case that reflected a fundamentally different approach to constitutional property law. In *Mahon*, Holmes does not treat the safety concern addressed by the Kohler Act as having any weight. He does not treat the coal industry as a business affected with a public interest. Under the case law at the time, that should have been the end of the inquiry; the statute should have been held unconstitutional without further ado. Because *Mahon* embodies the view, as I think it unquestionably does, that the Kohler Act would have been constitutional if it had not diminished value so greatly, *Mahon* reflects a dramatically new approach to government regulation. Examination of progressive legal scholarship can help clarify this point. Seeking to expand the realm of permissible government regulation beyond traditional police power ends, liberal scholars in the 1920s and 1930s argued that, in reality, all businesses were businesses affected with a public interest and all businesses could thus be subject to extensive government regulation. For example, in his classic article, *For Whom Are Corporate Managers Trustees?*,[52] Professor E. Merrick Dodd, Jr., wrote:

> Despite certain recent conservative decisions . . ., it may well be that law is approaching a point of view which will regard all business as affected with a public interest. If certain businesses then continue to be allowed unregulated profits, it will be because the lawmakers regard the competitive conditions under which such businesses are carried on as making regulation of profits unnecessary, and not because the owners of such enterprises have any constitutional right to have their property treated as private in the sense which property held merely for private use is private.[53]

In other words, Dodd and other scholars took the view that the police power had to be dramatically expanded; so long as government regulation of business pursued a broadly understood conception of the public good and so long as it did not diminish the value of property too greatly, it should be deemed constitutional.[54]

What no one saw was that Holmes in *Mahon* and his other constitutional property decisions had already adopted essentially this same position. But his

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and caselaw discussed in Brauneis, *supra* note 6, at 672 n.270, 673-75). The cases Brauneis mentions, however, are best understood as involving physical interference with property, another traditional category. *Mahon* remains innovative, except for dicta in Holmes's opinions.

51. Brauneis, *supra* note 6, at 666.

52. 40 HARV. L. REV. 1145 (1932).

53. *Id.* at 1149 (emphasis added).

54. For other articles advancing such arguments, see Robert L. Hale, *Rate Making and the Revision of the Property Concept*, COLUM. L. REV. 209 (1922); Walton Hamilton, *Affectation with a Public Interest*, 39 YALE L.J. 1089 (1930). *See also* Treanor, *supra* note 2, at 866 & n.308 (discussing this scholarship).

intent was not understood and liberals, as a result, did not turn to *Mahon* for support. As the responses of Professors Epstein and Brauneis illustrate, that misunderstanding of the case has continued. It is ironic that a decision that embodied a view that courts should defer to majoritarian decisionmaking has become the case on which the takings revival has placed primary reliance. As I argue in my article, that misreading is also profoundly unfortunate, because it has led to an inappropriately broad reading of the Takings Clause.[55] At the end of my article, I applauded *Mahon* as an "intellectual tour de force."[56] Along similar lines, at the beginning of this response, I suggested that *Mahon* was great art. But, in evaluating *Mahon*, it is important to recognize as well that Holmes's fondness for aphorisms rather than careful articulation of his legal analysis has imposed serious costs. To paraphrase Holmes, great art, like hard cases, makes bad law.[57]

55. Treanor, *supra* note 2, at 871-74.

56. For my discussion of the merits of Holmes's approach, see Treanor, *supra* note 2, at 874.

57. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law").